

## NEW MEXICO CONTESTED ELECTION.

MAY 10, 1856.—Ordered to be printed.

Mr. W. R. SMITH, from the Committee of Elections, made the following

### REPORT.

*The Committee of Elections, to whom was referred the memorial of Miguel A. Otero, contesting the seat of José M. Gallegos, the sitting delegate from the Territory of New Mexico, have had the same under consideration, and make the following report :*

The contestant, Miguel A. Otero, claims the seat now occupied by the Hon. José M. Gallegos, upon eleven specifications as set forth in his memorial to Congress; the most important of which your committee have examined in connexion with the testimony.

The first question is presented in the following words by the contestant :

“1. Under the eighth article of the treaty of peace between the United States and the republic of Mexico, proclaimed July 4, 1848, among other things it was provided that ‘those Mexican citizens who shall prefer to remain in the said territories may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States, but they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of the year without having declared their intention to retain the character of Mexican citizens, shall be considered to have elected to become citizens of the United States.’” The said contestant avers that, “in the county of Santa Fe, in precincts numbers one, two, three, four, five, six, seven, and eight, eight hundred voters who had elected as aforesaid, under said treaty, to retain the title and rights of Mexican citizens within one year from the ratification of said treaty, and who were not American citizens, and who had no right to vote, and who were disqualified from voting by the decision of the supreme court of New Mexico—which decision is unreversed and unappealed from—and who were also disqualified by the thirty-eighth section of the election law of said Territory, did, at said election, on the third day of September, 1855, in said precincts in said county, cast for you illegal votes to the

number of eight hundred, which votes should be rejected, and not counted in your favor, but were counted for you as legal votes.

"2. In the county of Rio Arriba, in precincts numbers one, two, three, four, five, six, seven, and eight, six hundred illegal votes of Mexican citizens having no right to vote were polled and counted for you when they should have been rejected.

"8. In precincts numbers one, two, three, four, five, six, seven, and eight, in Santa Fe county, minors and Mexican citizens, and persons not entitled to vote, to the number of five hundred, illegally voted for you, and said votes were counted for you, and they should have been rejected."

In referring to the treaty of peace between Mexico and the United States, your committee find the 8th article of said treaty to be in the words as above set forth by the contestant. (U. S. Statutes at Large, vol. 9, page 929.)

The organic law of the Territory (U. S. Statutes at Large, vol. 9, page 449) provides that "the right of suffrage shall be exercised only by citizens of the United States, including those recognised as citizens by the treaty." The election law of the Territory, in sections 19, 21, and 28, expressly confines the *right of suffrage to citizens of the United States*, and declares heavy penalties against "*any Mexican citizen*" who shall vote.

But it is contended by the sitting delegate, through his counsel, "that it is a conclusive answer to this that no notice was given of the particular voters intended to be impeached on this ground."

Your committee think that the notice was quite sufficient to authorize the taking of the testimony. No such objection was made by the sitting member or his counsel at the time of taking the depositions. On the contrary, he appeared and cross-examined the witnesses without any objection whatever; and if he had had no notice at all, but had appeared and cross-examined, he would have been estopped from setting up the want of notice.

But the sitting delegate, through his counsel, says, further, in substance, that the manner in which the said Mexican citizens elected to remain Mexican citizens, under the 8th article of the treaty above referred to, was not sufficient in law to make them illegal voters; that it required an act of Congress to constitute the tribunal to receive the declaration and to prescribe the mode of making it.

No act of Congress has ever been passed prescribing the mode of making the "election to remain as Mexican citizens." Your committee, for many reasons, think that no act of Congress was necessary. If an act had been necessary, the neglect of Congress to pass such an act would amount to an abrogation of that clause of the treaty, because the time of making the declaration is limited to "one year from the date of the exchange of the ratifications of this treaty." The treaty, in the 8th article, conferred upon Mexican citizens the right to retain that citizenship by making a declaration to that effect, but required them to do it within one year; and it will not be seriously contended that the failure of Congress to provide a particular mode of making that declaration would deprive the citizens of so important a right, secured to them in so solemn a form as a treaty stipulation. It will

be remembered that citizens of this Territory were, at the time, citizens of Mexico, and the treaty did not intend to make them American citizens without their own consent. It would be a mere mockery to say that they had the right to retain the character of Mexican citizens, and yet could not do so, because no mode of doing it had been prescribed by law.

As this is an important point in this case, your committee deem it due to the House to show the precise manner in which the "declaration" was made.

The military governor of the Territory, Col. Washington, in pursuance of the eighth article in the treaty, issued a proclamation in the Spanish language, of which the following is a translation :

*"To the people of New Mexico.*

"Whereas, by the eighth article of the late treaty of peace, friendship and limits between the United States of America and the United Mexican States, the inhabitants of the territories ceded to the United States are required to declare their intentions to remain citizens of the Mexican republic within one year, reckoned from the date of the ratification of the treaty ; and those who remain in the said territories after the lapse of one year, without having declared their intentions to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States ; and whereas the year, reckoned from the ratification of the treaty, will expire on the thirtieth of next May ; and as it is desirable, for the unembarrassed action of the government, that it should be publicly known who, at that time, shall have become entitled to the rights and privileges, and shall have made themselves subject to the duties of citizens of the United States—

"Therefore, I, John M. Washington, governor of the Territory of New Mexico, do hereby direct that there shall be immediately opened in the prefectures of the several counties of the Territory, by the clerks of the courts of the prefectures, registers of enrolment as follows : *'We elect to retain the character of Mexican citizens.'*

"And those who in each county shall elect to do so, may personally register their names ; and those who do not appear and sign said declaration on or before the thirtieth of next May shall be, in accordance with the treaty, considered citizens of the United States.

"Within six days after the thirtieth of May, the registers shall be sent with the certificates of the clerks of the prefectures of the several counties to the secretary of the Territory, in order that they may be by him published and distributed to the several tribunals of justice in the Territory.

"Given under my hand and seal at Santa Fé, the twenty-first of April, eighteen hundred and forty-nine.

"J. M. WASHINGTON."

Under this proclamation many Mexican citizens made the declaration, and retained their "Mexican citizenship," according to the aforesaid eighth article of the treaty.

Your committee are of opinion that, in the absence of any Congressional enactment, the governor of the Territory was the proper person to designate the tribunal and to prescribe the mode of making the declaration; and that any declaration made in good faith, under the foregoing proclamation, is legally valid in all essential respects. Col. Washington was the agent of the government, and his proclamation was a public act, which Congress will notice without formal proof of its issuance, although it is shown by the witnesses, [see printed testimony in this case, page 22,] that the Mexican citizens acted in pursuance of Governor Washington's proclamation.

Accompanying the depositions is the original book opened and kept by the clerk of the prefect court of the county of Santa Fé, identified and marked as an exhibit, upon which appear the names of many of the persons who are alleged as having illegally voted for José M. Gallegos.

At the commencement of this book is a declaration, in both English and Spanish, as follows:

*"We elect to retain the character of Mexican citizens."*

*"Nostros elejimos retener el caractar de ciudadanos Mexicanos."*

Following the list of signatures to this declaration is the following certificate:

"TERRITORY OF NEW MEXICO,

*"County of Santa Fe:*

"I, James M. Giddings, clerk of the prefect court, do hereby certify that the foregoing is a correct list of all who have elected in said county to retain the character of Mexican citizens.

"Given under my hand and seal this 1st day of June, 1849.

[L. S.]

"JAMES M. GIDDINGS, *Clerk.*

"By T. B. GIDDINGS, *D. C.*"

This proceeding was a substantial compliance with the provisions of the treaty, and a literal execution of its terms. The men who subscribed that declaration, or who authorized their names to be subscribed, declined to acquire the rights of American citizens, and cannot now acquire that citizenship except by the process of naturalization under the laws of the United States. They had the option; and having made their choice, they must submit to the consequences. Your committee are of opinion that all such persons as elected under the treaty to retain the "character of Mexican citizens" are, and were at the time, unnaturalized foreigners, and as such, having no right to vote, their votes ought to be rejected.

The evidence of the making of the declaration, and that some of the declarants voted for the sitting delegate, is not conclusive; but it is quite sufficient, in the opinion of your committee, to throw the *onus probandi* upon the sitting delegate. This evidence will be found in the printed testimony, from pages 20 to 40, a portion of which your committee beg leave to examine.

James Barry, clerk of the probate court of Rio Arriba county, page 20, states that at least eleven hundred inhabitants of that county subscribed the declaration to retain their character as Mexican citi-

zens; and on page 21 he further says, that of these at least two-thirds appeared personally before him and signed the paper. He points out the names of eleven voters who had signed the declaration, and who voted in two precincts where the contestant received only one vote. Ten of these votes, therefore, must be taken from the number given to the sitting member.

James Giddings, page 22, and Donaciano Vigil, pages 25, 26, 27, and 28, prove that in the county of Santa Fé the following votes were given by persons who had signed the declaration in that county:

In precinct No. 4.....	71	Mexican votes.
In precinct No. 3.....	41	do.
In precinct No. 6.....	16	do.
In precinct No. 1.....	4	do.
In precinct No. 7.....	1	do.
		<hr/>
Total in Santa Fé county.....	133	
In Rio Arriba county.....	10	
		<hr/>
		143
		<hr/>

It is also proved, by examination of the poll-books, that all these persons voted for the sitting delegate. As the sitting delegate had only a majority of 99, to take these illegal votes from him would leave him in a minority of 44.

Deducting one illegal vote, for the county of Arriba, from Otero's vote, leaves his majority 43.

But an attempt is made to break the force of this testimony, by showing that, in some instances, there was more than one person of the same name, and in others that persons whose names are on the declaration list did not themselves subscribe the declaration. But, upon a close examination of the depositions taken to establish these facts, it will be found that they are evasive and unsatisfactory, and prove little or nothing to the point. On pages 33, 34, and 35, these depositions will be seen; and all but one of them are given by persons who could not write their names. They simply testify that they did not sign; which, of course, they did not do, as they could not write. But it is remarkable that they do not say that they did not authorize some other person to sign the declaration for them.

Again, the three witnesses Miguel E. Pino, Andreas Tapia, and Augustin Duran, (pages 35 and 36,) testify that they subscribed the names of other persons; but they do not deny that the persons whose names they subscribed authorized them to do so. It is not to be presumed that they committed forgery.

But throw out every vote in which the voter declares that he did not himself sign the declaration, and also every instance in which there is proof that there was more than one person of the same name, and this will take only 12 from the number of illegal votes, and there will still remain 131, which will give the contestant a majority of 32.

The *prima facie* evidence that the persons who elected to remain as "Mexican citizens" are the same whose names appear on the poll-



books as having voted for Gallegos remains uncontradicted, except as to the 12 votes above referred to, which your committee have concluded to count for the sitting delegate.

The next point relied on by the contestant is found in the following specification :

"9. In precinct number ———, at Mesilla, in the county of Doña Ana, votes to the number of three hundred and twenty-nine, which were illegal, fraudulent, and void, were counted for you by the secretary of the Territory of New Mexico, when they should have been rejected, for the following reasons: First, because the poll-books for said precinct, by the probate judge of said county, were not used at said election, by the unlawful interference of the priest at Mesilla; second, because there was but one poll-book kept at said precinct; third, because votes to the number of one hundred were illegally received for you after six o'clock on said day; fourth, because one hundred and ninety-six votes, placed in the ballot-box of said precinct for me, and which should have been counted for me, were not counted for me, but remained in said ballot-box uncounted; fifth, because the judges of said election at said precinct, appointed according to law, were not permitted to serve, and others, without being sworn according to law, or entitled to act as judges, did act as judges of said election at said precinct; sixth, because at the time of counting the votes of said county before the probate judge of Doña Ana county, William Claude Jones, a citizen having the right to question the legality or illegality of said votes, did then and there question, before the probate judge of said county, the legality of all the votes polled at said precinct, and the said votes, numbering four hundred and one, of which you received the number of three hundred and twenty-nine votes, were adjudged illegal, fraudulent, and void, by the said probate judge of said county, and should not have been counted for you by the secretary of the Territory of New Mexico, but were illegally counted for you by him."

This specification gives rise to the necessity of examining the acts of the Territorial legislature of New Mexico, on the subject of elections; and the following clauses of said acts are deemed important in elucidating the facts:

"SEC. 10. The probate judges shall cause two poll-books to be made for each precinct in the manner prescribed in the following section, and shall forward them to the judges of the election on the day they are notified of their appointment.

"SEC. 11. It shall be sufficient for the poll-books to contain, in substance, as follows:

"Poll-book of the election held on the ——— day of ———, 18—, in the precinct of ———, in the county of ———, for the election or ———. This certifies that the judges appointed were sworn according to law; signatures of the persons taking the oath; names of voters; names of persons voted for.

"The polls being closed, the number of votes received by each candidate shall be added up at the foot of each column.

"CERTIFICATE.

"We, the undersigned, judges and clerks of elections held on the

— day of September, 1851, in the precinct of —, in the county of —, certify that, having counted the votes polled for the respective candidates in said election, the result is as follows: A received — votes for the office of —. Mr. B received — votes for the office of —. Mr. C received — votes for the office of —. O., &c. Here the names of the judges who signed; and here sign the clerks, Z. O. —, who are H. Y.

"SEC. 12. The judges of the election, before entering upon the discharge of their duties, shall take an oath for [before] any judicial authority, or shall swear each other mutually in the following manner: I, —, swear impartially to discharge the duties of judge of the present election according to law and to the best of my knowledge, so help me God.

"SEC. 13. Said judges shall appoint two clerks, who, before entering upon the discharge of their duties, shall take an oath before one of the judges of the election, faithfully to record the names of all the voters, and impartially discharge their duties as clerks of the election.

"SEC. 15. If any probate judge should fail to appoint the judges provided by this act, or if from any cause they shall fail to attend at their respective precincts on the day of the election, it shall be lawful for a majority of the qualified voters in the precinct where said vacancy occurs to appoint judges, who shall conduct said election in the same manner and to the same effect as if they had been appointed by the judge of probate, as provided in this act.

"SEC. 16. The polls shall be open from nine o'clock a. m. until six o'clock p. m., without adjourning, unless by consent of the people. After closing the polls the votes shall be counted in public by the judges, with the assistance of the clerks, *one of whom shall take one of the poll-books*, without delay, to the probate judge, in whose office *one of the poll-books shall remain for the public inspection of any person whatsoever*.

"SEC. 17. Within six days after the election, the probate judge shall call to his assistance one of the justices of the peace of the county, and publicly examine and count the votes polled for each candidate, giving notice thereof two days previous, which notice shall be posted up at the court-house for the information of the people, where the examination is to be held, *and any citizen shall have the right to question the legality or illegality of any vote*.

"SEC. 22. All votes shall be by ballot, each voter being required to deliver his own vote in person. Each ticket shall be numbered and the number placed opposite the name of the voter; said tickets shall in no case be *examined*, unless the election be contested, but shall be delivered by the judges of the election to the probate judge of the county, who shall retain them until the expiration of the time allowed for the contesting of the election, and they shall then be destroyed."

As connected with these laws, we will examine the facts.

The judges of election were not sworn, as required by section 12, above quoted.

The proof of this fact is found in the deposition of Richard Campbell, probate judge of the county of Doña Ana, (page 40 of the printed

testimony,) where he says, "two sheets of one of the poll-books were returned to me with *the oath and certificate not signed.*"

At page 42 of the printed testimony will be found a transcript of the judicial action of the probate judge, annulling the election at this precinct, for the reason stated, as well as for other reasons. It is not necessary to inquire into the powers of the judge of probate in annulling the vote at this precinct, for the House of Representatives has undoubtedly the right to revise this act of the probate judge; and hence we must look to facts as we find them in the testimony, in order to determine whether or not this vote should be rejected. The only use we have for the decree of the probate court, is to inquire into it as evidence, as far as it goes.

This judgment, which will be found on page 42 of the printed testimony, is as follows:

"EXHIBIT A.

"FRIDAY, *September 7, 1855.*

"Court met pursuant to adjournment.

"In pursuance of the order of the probate court, dated Tuesday, the 4th instant, this day was set apart for the examination of the votes polled at the election held on the 3d instant. Having called in the assistance of Thomas J. Bull, justice of the peace for Las Cruces precinct, the court now proceeds to examine and count the votes, commencing with the precinct of La Mesilla; and it appearing that there was but one poll-book made out by the judges and clerks of election precinct, W. C. Jones files a motion to reject and annul the election of said precinct; and it appearing, upon further examination, that there were one hundred and ninety-five votes within the ballot-box which were not numbered and not down on the poll-books, which number of votes appearing to be all on one side, gives it greatly the appearance of fraud; and further, that the certificate showing that the judges appointed were sworn according to law, was not signed as the law directs; and further, that they refused to use the poll-books furnished and made out in proper form according to law; that they made out others which were not in form as required by law; therefore it is hereby ordered and decreed by this court, that the returns from said precinct of Mesilla be and the same are hereby rejected and annulled on account of illegality of same, and evident fraud on the part of judges, clerks, or other persons having to do at the polls of said election.

"R. CAMPBELL,  
"Probate Judge."

The 11th section of the election laws, herein above referred to, gives the form of certificate which shall be at the head of the poll-books and signed by the judges; and this form includes a certificate that the judges were sworn. This certificate signed would be legal evidence of the fact that the judges took the requisite oath, but in the present case it is absolutely wanting. It is not insisted that no other proof could be admitted to establish the fact that the judges



were sworn ; but in the absence of the proper legal certificate, and of all other evidence of the fact, it must be admitted that this essential requisite of the law has not been complied with.

In the case of *Draper vs. Johnston*, (see *Contested Elections*, page 710,) the following rule was laid down :

“When such oath is required it will be presumed to have been taken, unless the contrary appears, and the *onus probandi* will be thrown upon him who alleges the omission of it ; but, as the law of Virginia requires a record of the oath to be made in the clerk’s office, a certificate from the clerk that it has not been filed may be sufficient to shift the burden of proof upon the other party.”

Instead of the certificate of the clerk that the oath is not recorded, we have in this case the testimony of the judge of probate that the certificate was not signed ; and we also have his judicial decree annulling the election at that precinct, containing as one of the reasons that the certificate and oath of the judges was not signed.

If the judges of the election at Mesilla precinct had taken the requisite oath, the fact could have been proved by the judges themselves. The neglect to prove this on the part of the sitting delegate strengthens the supposition that they were not sworn. The action of the probate judge was public, and the legality of the election at that precinct was openly impeached by W. C. Jones, under the 17th section of the Territorial law ; and the neglect of the judges of election to be sworn is especially referred to in the notice.

Your committee are not satisfied that the judges were sworn, and they refer the House to the uniform rule, as heretofore acted upon by the House.

In *McFarland vs. Culpepper*, (*Contested Elections*, page 221,) it was decided that “the neglect of returning officers to be sworn when the law requires them to act under oath will vitiate all returns made by them.”

In *Draper vs. Johnston*, (*Contested Elections*, page 702,) it was decided that “the neglect of the election officers to take the oath required by law will vitiate the poll for the county or precinct in which such officer acts.”

In *Easton vs. Scott*, (*Contested Elections*, page 272,) it was decided that “when an election is required to be held by *three* who are to be sworn, and it is held by *two* who are not sworn, their proceedings are irregular, and the votes taken by them are to be rejected.”

The other irregularities and illegalities at this precinct were very great.

The probate judge, as required by law, furnished the poll-books for this precinct in due and proper form, as will be seen from his deposition, on page 39 of the printed testimony. They were rejected by the judges of election, and others substituted which did not contain the requisite certificates, either in form or in essential substance.

The law requires *two* poll-books to be kept—one to be sent to the secretary of the Territory, and the other to be retained by the probate judge. In this case only one was kept, and that was deficient in form and substance, and was upon loose sheets of paper, which gave every opportunity for fraud and unfairness.

Two clerks are to be appointed and sworn ; and it may well be presumed that they are expected to act as a check, the one upon the other. At the Mesilla precinct, this important function was not performed. There were two clerks ; but it does not appear that they were sworn, and they did not pretend to keep more than one poll-book, and that upon loose sheets of paper, which might be abstracted or altered.

By section 22 of the election law herein above quoted, it is enacted that "*all votes shall be by ballot, each voter being required to deliver his own vote in person. Each ticket shall be numbered, and the number placed opposite the name of the voter ; said ticket shall in no case be examined, unless the election be contested.*" It is apparent that the law intended to give the voters the advantage of secrecy in depositing their suffrages, with a positive prohibition against violating this secrecy, except in case of a contest between the the rival candidates. The voter was by law entitled to the protection of the ballot, and the judges had no right whatever to deprive him of that protection by crying out his vote as it was deposited in the box.

In the case of Easton *vs.* Scott, (Contested Elections, page 272,) the following rules were acted upon :

"When votes are given by *ballot*, an elector cannot be compelled to disclose the name of the candidate for whom he voted."

"If votes are required by law to be given by ballot, *viva voce* votes ought not to be received."

In the case before us, Bartolo Madrid (printed testimony, page 56) testifies as follows :

"*Sixth question.* As the tickets were handed in by the voters, were they opened and 'cried out,' and then registered, or were they put into the box and afterwards taken out, 'cried out,' and registered ?

"*Answer.* As the tickets were handed in, the president of the election took them and opened them, and 'cried them out ;' the number and registry was then made, the ticket again doubled and put into the box by the president, and were not taken out and counted by the judges and clerks."

Your committee are of opinion that this irregularity violated the sacred right of secrecy belonging to the voter. The arrogance of an election president or judge, in assuming and exercising the right to open and proclaim a ballot in presence of the elector as he handed in his vote, is equal to compelling the elector to disclose the name of the candidate for whom he votes. It seems to your committee, that, if the testimony of Madrid is to be credited, this proceeding amounted to a *viva voce* election.

#### *Deposition of Bartolo Madrid.*

"*Answer.* I was one of the clerks of said election. The poll-books sent by the probate judge, and brought by the sheriff, were not used in the election, because all of the columns were occupied by the names of candidates written in them. This was noticed by myself and others in the office of Reyes Escontreas ; and, as we did not then know for whom the people wished to vote, and as the columns were all filled with names of candidates already, we did not use them, but they

were sent back by Trujillo, as presiding judge of the election. On the day of the election Trujillo presented two other poll-books, with half of the columns occupied with the names of the party of Trujillo ; the other half of the columns were left blank for the names of the candidates of the other party."

*Deposition of Richard Campbell.*

"I was probate judge, and James A. Lucas was probate clerk.

"Two good and sufficient poll-books were made out, under my direction, by James A. Lucas, clerk, with the form of the oath and of the necessary certificate upon each one ; and the said clerk then sent them to said precinct, with a notice to Santiago Trujillo, Valentine Maese, and one other whose name I do not recollect, who were appointed judges.

"Two sheets of one of the books were returned to me with the oath and certificate not signed, and the sheets contained about thirty names ; the remainder of the books I do not know what became of them.

"The form and substance of the books furnished by him were according to law."

"Santiago Trujillo, being duly sworn, upon his oath deposeth and saith :

"I was a judge of the election. Some names were registered as handed in, and others not, owing to the great crowd of voters pressing forward to put in their votes.

"Cristobal Escarate was present on the day of said election. He was neither a judge nor clerk of the same.

"He took hold of some tickets as handed by voters, and wrote thereon the name and number of the voter and ticket, in conformity with the number on the poll-book. I requested him not to interfere, and he replied that he did so to expedite the election."

No one can tell what frauds or omissions were committed by means of this irregular and unlawful process. The law, as already quoted, expressly requires the ballots to be given in by the voter himself.

But it is attempted, on the part of the sitting delegate, to rebut this evidence of illegality and irregularities in the election and returns from Mesilla, by proving frauds on the part of the contestant's friends. If any such frauds were attempted, they were not successful, for the votes have not been counted. But, whether attempted or not attempted, and whether successful or not successful, the alleged frauds should not have the effect of curing the palpable illegality of the whole election, and of making that valid and effectual which was otherwise wholly nugatory and void. The circumstances stated by the several witnesses only serve to show the looseness and irregularity with which the whole election was conducted, and they tend to strengthen the argument in favor of setting aside the entire vote, as unreliable and tainted with fraud. For the testimony touching this point, the House is referred to pages 36, 50, 51, and 69, of the printed testimony.

Your committee have found, in examining this testimony, the following among other important facts:

That the secrecy of the ballot was violated by the act of the judge, in crying out the votes in the presence of the voters, as they handed in their tickets.

That the officers of the election were not sworn.

That a bystander, one Escarate, who was neither a judge nor a clerk, was allowed to take the tickets, as handed in by the voters, and write upon them, and then hand them to the judges.

That the poll-books, as furnished by the judge of probate, according to law, were rejected by the judges, and others, on loose sheets of paper, substituted and used.

That 192 ballots were found in the box not numbered or registered, and it is alleged that one of the judges connived at and assisted in this fraud.

The election at the Mesilla precinct is so surrounded with fraud, irregularity, illegality, and mystery, that a majority of your committee recommend that the votes at that precinct be rejected.

Your committee having thus concluded that the seat ought to be given to the contestant, feel it due to themselves to state that they have examined all the points of defence as presented by the sitting delegate, and they find nothing to change their conclusion. They nevertheless present herewith that point of defence which relates to the precinct of Chamisal, as thus made by the sitting delegate:

"I allege that in the precinct of Chamisal, being precinct number —, at the Rincones, in the county of Taos, the legal votes of one hundred and sixty of the legal voters of said precinct were fraudulently abstracted from the ballot-box in said precinct, and one hundred and sixty illegal votes in your favor were put in said ballot-box in place of said votes so abstracted; and that one of the judges of election in said precinct, when charged by the voters of said precinct with having been guilty of said fraud, did not deny it."

In order to maintain this allegation, the sitting delegate caused the attorney of the contestant in New Mexico to be served with the following notice:

"SANTA FE, NEW MEXICO,  
"November 30, 1855.

"SIR: Take notice, that on Wednesday, the 29th day of December, 1855, at the precinct of Chamisal, in the county of Taos, I shall proceed to examine, before the Hon. J. J. Deavenport, chief justice of the supreme court of the Territory of New Mexico, the following witnesses, in regard to the contested election of delegate from this Territory to the thirty-fourth American Congress."

The evidence was taken, with the following certificate appended to it:

"I, Horace Long, judge of probate for the county of Taos and Territory of New Mexico, do hereby certify that the foregoing named one hundred and twenty-four persons this day appeared personally before me, and each for himself declared, under oath, that he was a resident of the precinct of Chamisal, in the county of Taos; that he voted on

the third day of September last, and that he voted for José Manuel Gallegos for delegate from this Territory to the 34th American Congress. And I further certify that the foregoing thirteen pages contain all the evidence taken before me.

“Given under my hand and private seal, (no official seal for the probate court of said county having been provided,) this nineteenth day of December, A. D. 1855.

“HORACE LONG, *Probate Judge.*”

A majority of your committee are of opinion that this evidence ought to be rejected. It was to have been taken before the Hon. J. J. Deavenport, chief justice of the Territory, and it was actually taken before Horace Long, judge of probate for the county of Taos.

As appears in the printed testimony, pages 59 to 64, one hundred and twenty-four persons are named—which persons, the aforesaid judge certifies, said, upon oath, that they voted for Gallegos at Chamisal; while the poll-books and the ballots, as well as the certificate of the judges, show that Gallegos received only eighteen votes at that precinct. Albino Chicon, (printed testimony, pages 15 to 17,) one of the judges, testifies to the contrary, as follows:

*Second question.* Were you present at the last congressional election in the precinct of Chamisal en Los Rincones?

*Answer.* I was.

*Third question.* What office did you hold?

*Answer.* One of the judges of election.

*Fourth question.* Do you know how many votes were given at your precinct; and if so, state the number of votes?

[Objected to.]

*Answer.* One hundred and sixty-nine votes.

*Seventh question.* Do you know in whose possession, after the day of election, the ballot-box remained?

*Answer.* Yes, sir; it remained in my possession.

*Eighth question.* Did not a justice of the peace interfere to quell a difficulty arisen between you and the other judge of election, concerning the custody of the ballot-box?

*Answer.* No, sir; but I heard that such a dispute had arisen in the house of the justice of the peace, and I immediately secured the ballot-box.

*Ninth question.* On what day and hour did you secure it?

*Answer.* On the fourth, immediately after sunrise.

*Tenth question.* Did you not steal during the night, or cause to be stolen, about 140 of the votes given for Gallegos, and put others in for Otero?

*Answer.* I did not.

If these one hundred and twenty-four voters state the truth, there must have been fraudulent collusion and combination among all the three judges as well as the two clerks; for, by the process of marking, numbering, and recording the ballots, it would have been wholly impossible to execute such a fraud without detection, unless by the co-operation of all the officers acting at the polls. Why are not the other judges and the clerks questioned as to the fraud? It seems in-



credible that such a wholesale deception as this could have been perpetrated without some palpable trace of it which might have been exposed by an examination of the officers who presided at the election.

But we are not informed whether these one hundred and twenty-four voters could read the tickets they deposited, or whether they were not imposed upon in the ballots used. Their testimony, in order to have any weight, ought to have been more circumstantial and direct. They should have said: "I handed to the judges a ticket which had on it the name of José M. Gallegos for delegate." Many officers were voted for at the same time, and the tickets contained the names of many candidates. Voters might easily have been deceived or misled, so as to use tickets with the wrong names.

This, however, is upon the supposition that these hundred and twenty-four witnesses are honest and truthful. The greater probability is that they changed their minds after the election, and thus attempted to undo what they had accomplished by their votes.

But it may well be questioned whether such testimony as this ought to be received to invalidate an election. It would be productive of unending frauds and perjuries to permit parties to come forward after an election by ballot and swear that they voted differently from what the ballots themselves exhibit. Especially must this principle apply under the system adopted in New Mexico, where every ticket is numbered, and the number also recorded in the poll-books opposite to the name of the voter. The only proof which ought to be admitted to establish a fraud such as that charged in this case, would be to show, by affirmative testimony, that the judges, clerks, or some other persons, actually withdrew the tickets given by the voters, and substituted others for them. Until this shall be shown, the oath of the voter should not be received to contradict the record and the ballots themselves. The very nature of the ballot renders this principle a necessity; otherwise every election might be tried over a second time by the oath of the voters instead of the ballots deposited in the boxes in the presence of the officers and of the public.

In the case of *Van Rensselaer vs. Van Allen*, (Contested Elections, page 76,) your committee find the following remarks, setting forth the principles which seem to have been acted on in that case:

"The petition stated that numbers of persons had sworn that they had voted for the petitioner, whose votes, by the returns, it does not appear were counted. On this it was observed that the committee did not consider this allegation of a nature proper to engage their attention. It was presumed that the House of Representatives would never institute an inquiry into such a species of evidence. It was extremely difficult for a man to swear that he had positively voted by ballot for a particular candidate, since it is well known that persons had, on such occasions, frequently put in a ballot for the person he had not intended to vote for. In the hurry and confusion which often take place the ballots get shifted, and one is put in in lieu of the other."

Even then admitting, for the sake of argument, that the testimony had been properly taken according to the notice, your committee would hesitate long before recommending the House to attach any importance to it, or to admit so dangerous a precedent.

It appears that Gallegos' majority, upon which his certificate was awarded, was..... 99 votes.  
 Your committee find of Mexican votes cast for Gallegos, which they think ought to be rejected..... 131

This gives Otero a majority of..... 32

Of the votes counted for Otero at the Mesilla precinct there were 72.  
 Of the votes counted for Gallegos at the Mesilla precinct there were..... 330  
 Deduct..... 72

Leaves ..... 258  
 32

This vote being rejected, leaves Otero's majority..... 290

Upon this state of facts your committee recommend the adoption of the following resolutions:

*Resolved*, That José M. Gallegos is not entitled to a seat in this body as delegate from the Territory of New Mexico.

*Resolved*, That Miguel A. Otero is entitled to a seat in this body as such delegate.

